RECORD AND BRIEFS

Supreme Court, U.S.
FILED
SEP 07 2017
OFFICE OF THE CLERK

No. 16-111

IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET. AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET. AL.,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* 33 FAMILY POLICY ORGANIZATIONS IN SUPPORT OF PETITIONERS

DAVID FRENCH
Counsel of record
Senior Fellow
NATIONAL REVIEW INSTITUTE
215 Lexington Avenue
11th Floor
New York, New York 10016
(931) 446-7572
dfrench@nationalreview.com

Counsel for Amici Curiae

QUESTION PRESENTED

Whether applying Colorado's public-accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. If Freedom of Conscience Can Survive the World's Worst War, It Should Survive the Sexual Revolution. 6

II. Creative Professionals and Corporations Consistently Exercise Their Rights under *Barnette* to Promote and Disassociate from Specific Values and Messages. 13

III. To Undermine *Barnette* Is To Cruelly Impoverish the Marketplace of Ideas. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Craig v. Masterpiece Cakeshop, Inc.,
370 P.3d 272 (Colo. App. 2015) 17-18

Obergefell v. Hodges,
135 S. Ct. 2584 (2015)..... 12, 26

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943)..... *passim*

Other Authorities:

Accessories: 42mm Pride Edition Woven Nylon, Apple, https://www.apple.com/ca/shop/product/MQ4G2AM/A/42mm-pride-edition-woven-nylon (last visited Sept. 5, 2017). 23

Allyn Vannoy, *Expanding the Size of the U.S. Military in World War II*, Warfare History Network (June 26, 2017), http://warfarehistorynetwork.com/daily/wwii/expanding-the-size-of-the-u-s-military-in-world-war-ii/..... 9

Anna Giaritelli, *Grocery store refuses to bake Trump-themed cake*, Washington Examiner, Sept. 7, 2016, http://www.washingtonexaminer.com/grocery-store-refuses-to-bake-trump-themed-cake/article/2601212. 17

Eric Bradner and Jeremy Diamond, *Mike Pence: 'Was I expecting this kind of backlash? Heavens no.,'* CNN (Mar. 31, 2015) http://edition.cnn.com/2015/03/31/politics/pence-will-fix-religious-freedom-legislation/index.html. 19

Libby Hill, *Some call it religious freedom, others call it anti-gay. Here's a look at the battle in some states*, L.A. Times, Apr. 5, 2016, http://www.latimes.com/entertainment/la-et-states-antigay-battle-20160325-snap-htmlstory.html#. 19-20

Mehera Bonner, *Here's the Growing List of Designers Who Refuse to Dress Melania Trump*, Maria Claire (Mar. 11, 2017), http://www.marieclaire.com/fashion/news/g4254/designers-who-wont-dress-melania-trump/?slide=10. 15

MJ Lee, *Walmart, Amazon, Sears, eBay to stop selling Confederate flag merchandise*, CNN (June 24, 2015) http://edition.cnn.com/2015/06/22/politics/confederate-flag-walmart-south-carolina/index.html. 20

Psalm 137:1-3 (KJV) 22

Psalm 137:5-6 (KJV) 22-23

Robin Givhan, *Should designers dress Melania and Ivanka? The question is more complex than it seems*, Washington Post, Jan. 12, 2017, https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/01/12/should-designers-dress-melania-and-ivanka-the-question-is-more-complex-than-it-seems/?hpid=hp_local-news_givhan-945am%3Ahomepage%2Fstory&utm_term=.e4613ea57e41 ..... 14, 15

Stephen Daggett, *Costs of Major U.S. Wars*, Congressional Research Service (June 29, 2010), https://fas.org/sgp/crs/natsec/RS22926.pdf 8

Susanna Kim, *Walmart apologizes for making ISIS cake for man denied Confederate Flag design*, ABC News (June 29, 2015), http://abcnews.go.com/Business/walmart-apologizes-making-isis-cake-man-denied-confederate/story?id=32103721 16

Ted Johnson, *Disney, Marvel to Boycott Georgia if Religious Liberty Bill is Passed*, Variety, Mar. 23, 2016, http://variety.com/2016/biz/news/disney-marvel-boycott-georgia-anti-gay-bill-1201737405/ 19

Timothy Cook, CEO, Apple, Address at the Newseum's 2017 Free Expression Awards Ceremony (April 18, 2017) (transcript and video available at https://www.c-span.org/video/?427127-1/newseum-presents-2017-free-expression-awards). 24-25

Tommy Tomlinson, *How the NFL Helped Kill Arizona's Anti-Gay Rights Bill*, Forbes, Feb. 27, 2014, https://www.forbes.com/sites/tommytomlinson/2014/02/27/arizona-gay-rights-and-the-super-bowl/#1dd14455214c. 19

Va. Bakery creates stir online with Confederate flag cake, ABC7 WJLA News (July 10, 2015), http://wjla.com/news/local/va-bakery-creates-stir-online-with-confederate-flag-cake-115430. 16-17

INTEREST OF AMICI CURIAE[1]

The 33 family policy councils and policy alliances listed below each work within their respective states to preserve religious liberty and rights of conscience from state overreach and government intrusion. They are nonprofits who advocate for the nation's first liberty – religious freedom – in courts, legislatures, governor's mansions, and in the court of public opinion. They are vitally concerned that the decision of the court below undermines a constitutional firewall against compelled speech and will drive from the marketplace creative professionals who dissent from state-mandated orthodoxy on matters of "politics, nationalism, religion, or other matters of opinion." The complete list follows:

Alaska Family Council, California Family Council, Colorado Family Action, Family Institute of Connecticut, Delaware Family Policy Council, Florida Family Policy Council, Hawaii Family Forum, Family Policy Alliance of Idaho, The FAMILY LEADER, Family Policy Alliance of Kansas, The Kentucky Family Foundation, Louisiana Family Forum, Christian Civic League of Maine, Massachusetts Family Institute, Minnesota Family Council,

---

[1] Petitioners and Respondent Colorado Civil Rights Commission have submitted blanket consents to the filing of amicus briefs in this case. Both are reflected on the Court's docket. *Amici* have obtained consent to file this brief from counsel for Respondents Charlie Craig and David Mullins. *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Montana Family Foundation, Nebraska Family Alliance, Cornerstone Action, New Jersey Family Policy Council, New Yorkers For Constitutional Freedoms, North Carolina Family Policy Council, Family Policy Alliance of North Dakota, Citizens for Community Values, Pennsylvania Family Council, Palmetto Family Alliance, Family Heritage Alliance, Family Action Council of Tennessee, Texas Values, The Family Foundation of Virginia, Family Policy Institute of Washington, The Family Policy Council of West Virginia, Wisconsin Family Council, and Family Policy Alliance.

SUMMARY OF ARGUMENT

"Your wedding cake is lovely. Who made it?"

Words like those have launched countless relationships between baker and patron – a union of two parties who cooperate together to create a unique form of expression to honor the lifelong union of marriage.

One doesn't have to be an expert in the wedding industry to recognize the extraordinary care, attention to detail, and artistry that is poured into the wedding cake, indeed into all of the trappings of the modern marriage. The cake has to be just so. The flowers have to be perfect. The photography is like a film production, preserving in virtual space the story of one of the most significant days of any man or woman's life.

Who can doubt the creativity of the best artists in the wedding business? Moreover, who can doubt the

significance of the marriage act itself? Sacramental in Catholicism, sacred in Protestantism, holy in religions the world over, and precious beyond words for the nation's secular citizens, the marriage ceremony isn't just the dry and formalistic signing of a civil contract but rather a signal moment in a human life.

Critically, while it is vitally important for all participants, it does not mean the same things for each of them. For Mormons, for example, a marriage is an eternal bond, sealing man and woman together in this life and the next. For most orthodox Christians, it's a once-in-a-lifetime bond, so that any subsequent marriages are inherently morally suspect unless there are specific, defined grounds for divorce or annulment.

To participate in a lawful, righteous marriage – however that is defined – is a cause for joy and celebration. For many, however, participation in an unlawful, unrighteous marriage is a cause for sorrow and even dread. Sin, after all, can carry with it eternal consequences.

It is for this reason, among others, that the state cannot, must not, compel any individual to participate in a wedding ceremony. To do so is an imposition on the human conscience every bit as grotesque and intrusive as a requirement that an individual blaspheme their own faith or pledge loyalty to a nation above their god. To do so is quite literally to compel the speech of the artist, to force them to cooperate in a vital act of expression, one with immense moral consequences.

Consequently, at issue in this case is nothing less than perhaps this Court's most enduring and potent constitutional clarion call, issued in the depths of the worst war this world has ever seen, that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

It is this call that has for generations helped preserve the American conscience, limited the reach of American government, and cultivated the robust diversity of American expression. It is this call that has clearly and plainly stated that the state bears the most difficult of all burdens to justify overcoming the human will, imposing itself on the human conscience, and forcing human beings to express things that they do not believe. If war could not justify such an action, can a peacetime change in sexual mores?

The facts in this case are simple and painfully clear. A baker has determined that he must not, consistent with the tenets of his faith, use his artistic talents to design and bake a cake that would celebrate the union of a man and a man. For this baker, a same-sex union is not a marriage at all, and to participate in celebrating an unrighteous union would render him culpable before God.

He does not refuse to serve gay customers. He only refuses to use his talents to celebrate or transmit messages that he finds morally objectionable. He applies the same standards to customers gay and

straight, white and black. No person, of any identity, should compel him to speak. The transaction between artist and customer should be what tradition and the Constitution dictate, a match between a patron and a willing creator.

As this brief will demonstrate, artists instinctively understand that they are not and should be not be automatons, with their creative energies at the employ of the highest or first bidder, regardless of the message. Liberties forged in the worst days of the deadliest war should easily survive the easy days of a long peace.

This brief will relate stories of artists who refused to reproduce Bible verses they found objectionable, design clothing for politicians they dislike, or to recreate flags of American enemies. But it will also go beyond, illustrating how corporations now view the decision to do business itself as a political act, granting or withholding economic opportunity on the basis of the rights of conscience of their leaders, employees, and shareholders. In each case, the artist, the CEO, and shareholder are exercising the right guaranteed by *Barnette*, to be free of any obligation express support for a cause they despise.

This Court decided *Barnette* in a moment of ultimate national crisis, before the tide had fully turned in a war not just for national survival but for the survival of liberty itself. It allowed boys and girls to opt out of a pledge of national loyalty, a pledge that simply declared that we were in this great struggle together, united as one nation. It allowed people of faith to shock the conscience and wound the dignity of

their friends and neighbors by standing apart from the prevailing national will.

Surely, if this Court can decide *Barnette* when a nation's very survival is at stake, it can reaffirm its central principle when rights of conscience collide with hurt feelings and personal convenience. The choice isn't between cakes or conscience. Same-sex couples enjoy an abundance of options, and in this very case the patrons easily found an alternative baker. Instead, reaffirming *Barnette* means our citizens can enjoy cakes *and* conscience. Let the patron find a willing creator, and let the unwilling artist keep his conscience clean.

ARGUMENT

I. If Freedom of Conscience Can Survive the World's Worst War, It Should Survive the Sexual Revolution.

Follow modern American political rhetoric, and one will find that hyperbole, exaggeration, and outrage are the order of the day. Seemingly every week our nation confronts a new "constitutional crisis" or "existential threat." But we should be clear, not every cry of "wolf" is false. There are true emergencies. There really are times when a nation stares into the abyss.

Even amateur students of history can think of our nation's most perilous moments. There's August 29, 1776, when General George Washington narrowly escaped the destruction of the young Continental Army when it slipped out of William Howe's grasp

after defeat at the Battle of Long Island. Who can forget July 3, 1863, Pickett's Charge, and the high-water mark of the Confederacy. The Battle of Gettysburg hung in the balance, and with it – arguably – the fate of the Union itself.

But there are other, later dates – like December 7, 1941, and the days and weeks that followed. American arms faced historic defeat after historic defeat. The bulk of the surface striking power of the Pacific Fleet was immobilized in the smoking ruin of Pearl Harbor. Japanese air, naval, and ground forces struck American possessions abroad with impunity, inflicting staggering defeat after staggering defeat. Hitler's submarines roamed the Atlantic at will, inflicting terrible losses and slowly strangling our English allies. Hope was in short supply.

January 7, 1942, marked the beginning of the Bataan Campaign, arguably the lowest point for American arms in the history of our nation. American and Philippine forces, under the command of Douglas MacArthur made a fighting retreat to the Bataan Peninsula on the island of Luzon. There, more than 100,000 allied forces stood against the invading Japanese. Over the next three months, they were ground into the dust, and when defeat finally came, it was capped off with the humiliating, deadly Bataan Death March – a moment that lives in its own unique infamy.

These were dark times. Casualty counts were staggering, and rumors of Japanese invasion caused immense fear on the west coast. In Europe, Hitler's empire was arguably at its apogee. Britain still stood,

but Nazi Germany dominated Western Europe, Eastern Europe, and a vast swathe of the Soviet Union. The Soviets had yet to inflict their staggering defeat on the Wehrmacht at Stalingrad. The fate of the world hung in the balance.

Thus, is it any wonder that on January 9, 1942, the West Virginia Board of Education adopted a resolution declaring that a salute to the flag be "a regular part of the program of activities in the public schools?" *Barnette*, 319 U.S. at 626. The Board required a "stiff-arm" salute, with the student raising his or her right hand, palm up, and repeating the Pledge of Allegiance. Failure to do so was an act of "insubordination" that could lead to expulsion. *Id.* at 628-629.

And why not? The nation was rallying for war: "All recruiting records of the nation's armed forces were shattered ... as thousands of men attempted to enlist for combat duty in the Army, Navy, Marine Corps or Coast Guard," reported the *New York Times* on Dec. 10, 1941. At the height of the Second World War, fully 37.5 percent of total national gross domestic product was dedicated to the war effort, an amount more than triple that dedicated to the Civil War and more than double that dedicated to World War I.[2] On July 1, 1939, the Army's strength was limited to 174,000 men. By the end of 1945,

---

[2] Stephen Daggett, *Costs of Major U.S. Wars*, Congressional Research Service (June 29, 2010), https://fas.org/sgp/crs/natsec/RS22926.pdf.

approximately 16 million Americans had served under arms.[3]

With fathers marching off to war and the nation preparing for a level of loss and sacrifice not seen since the Civil War, Americans craved tangible evidence that we were all in this together. What would sons and daughters of soldiers think if their classmates didn't stand beside them? When students sat down, didn't that mean they'd refuse the call if and when it came time to take their own turn in the line of battle? If there was ever a compelling need for national unity, wasn't it in January 1942? Surely, the overwhelming weight of popular opinion was decidedly against any who might object.

It is in this most intense atmosphere that this Court issued one of its most stirring calls not for ideological uniformity, but – critically – for constitutional fidelity. Just before the famous "fixed star" statement quoted in the introduction above, Justice Jackson – writing for a six-Justice majority – wrote words every bit as meaningful and just as applicable to the present dispute:

> Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are

---

[3] Allyn Vannoy, *Expanding the Size of the U.S. Military in World War II*, Warfare History Network (June 26, 2017), http://warfarehistorynetwork.com/daily/wwii/expanding-the-size-of-the-u-s-military-in-world-war-ii/.

> voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

319 U.S. at 641-642.

Note the key words: "[The] freedom to differ is not limited to things that do not matter much." National unity matters in war. Marriage matters to the vast majority of men and women. The test of the substance of the First Amendment is "the right to differ as to things that touch the heart of the existing order." In other words, are we free to disagree even when matters are important? Are we free to disagree even when lives are at stake?

Emerging from the *Barnette* precedent isn't a narrow ruling that no man can be required to pledge allegiance to the flag, but rather a far more sweeping precedent – one that has resonated so strongly that it has laid down a nearly iron-clad principle: The government may not compel speech in support of even the most virtuous and well-meaning of causes.

In *Barnette*, those who argued for the compulsory pledge quoted Abraham Lincoln, "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" *Id.* at 636. Yet even in time of war, the Court held that to be a false choice. Justice Jackson wisely wrote, "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and, by making us feel safe to live under it, makes for its better support." *Id.*

When threats to our national existence pale in comparison to the age of *Barnette*, the Colorado Civil Rights Commission oddly argues that government should be even stronger than it was when the danger of disunity was defeat. Now the "danger" isn't disunity in the face of a vicious enemy but rather disappointment in the face of a reluctant artist. The "danger" is merely a slightly longer Google search as a patron finds a willing baker. For the sake of preventing these few tears is the Court willing to overturn one of its greatest precedents?

And make no mistake, a ruling against Masterpiece Cakeshop would gut *Barnette*. To create works of culinary art, a good baker engages in very real physical, expressive acts, creating expression every bit as meaningful as a salute to the flag. Even the drawing or placing of two men or two women together on a cake expresses something deep and profound about the meaning of marriage itself.

In fact, in this very case, the wedding cake that the gay couple ultimately chose featured a rainbow

theme that unmistakably and quite particularly honored their gay union – the very thing that Masterpiece Cakeshop was most unwilling to celebrate. The cake in this case carried with it a custom message – one that made its own statement about the institution of marriage.

Just two years ago in *Obergefell v. Hodges*, Justice Kennedy wrote at great length about the meaning and importance of marriage, memorably declaring:

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

135 S. Ct. 2584, 2593-94 (2015).

When an artist creates a cake to celebrate a marriage, then, he is creating a work of art dedicated in its own way to the "transcendent importance" of the union of his patrons. Must he be required, however, to dedicate himself to honoring all marriages the state deems lawful? Must he delegate the determinations of

his faith and his conscience to state officials who now purport to re-define what is to him a holy and sacred covenant?

In fact, if one doubts that designing a cake or providing artistic services of any kind to meaningful and important events isn't an expressive act, then how does one answer the actions of many other bakers and artists in similar circumstances? How does one answer some of America's largest corporations – entities that use their considerable economic power to influence public debate? From the smallest business to the largest multinational corporations, the decision-makers know their actions are expressive, and they make decisions accordingly. It is to their choices that we now turn.

II. Creative Professionals and Corporations Consistently Exercise Their Rights under *Barnette* to Promote and Disassociate from Specific Values and Messages.

It is self-evidently true that our nation is enduring not just a period of polarization but also of information saturation. Citizens are keenly aware of the political implications of their actions, and news of political statements spread with greater speed than ever before. Indeed, given the urgency of American political discourse, citizens often *demand* to know where their favorite companies stand on the great issues of the day. They seek to enlist those companies in political crusades, to shift and shape public debate.

This is true regardless of whether the corporate expression itself makes a specific statement (like a

Confederate Flag or a product containing a slogan or explicit message) or whether the decision to do business *is* the statement.

Creative professionals in the fashion industry have refused to provide service for persons espousing political views which they find repugnant. The justifications they offer confirm that they see both their business transactions and their creative work as bearers of political and moral messages.

For example, shortly after the election of Donald Trump, a number of fashion designers (artists, to be sure) declared that they would, under no circumstances, "dress" Melania or Ivanka Trump – this despite the fact that dresses themselves rarely (if ever) contain a political or cultural message as explicit as the rainbow cake the gay couple ultimately chose in this case. Merely doing business with the Trumps was an intolerable notion to creative professionals who abhorred the Trump family's political methods and messages.

In an open letter rejecting the idea of working with the Trumps, designer Sophie Theallet said, "We value our artistic freedom, and always humbly seek to contribute to a more humane, conscious, and ethical way to create in this world." She said, "As an independent fashion brand, we consider our voice an expression of our artistic and philosophical ideas."[4]

---

[4] Robin Givhan, *Should designers dress Melania and Ivanka? The question is more complex than it seems*, Washington Post, Jan. 12, 2017, https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/01/12/should-designers-dress-melania-and-ivanka-the-question-is-more-complex-than-it-

And another designer, Naeem Khan, asserted: "A designer is an artist, and should have the choice of who they want to dress or not."[5]

In reporting on the designer choices, the *Washington Post's* Robin Givhan explained well how artists view their work:

> Like other creative individuals, Theallet sees fashion as a way of expressing her views about beauty and the way women are perceived in society. Fashion is her tool for communicating her world vision. In the same way that a poet's words or a musician's lyrics are a deeply personal reflection of the person who wrote them, a fashion designer's work can be equally as intimate. In many ways, it's why we are drawn to them. We feel a one-to-one connection.

Givhan, *supra* n. 4.

This is precisely true. Men and women are drawn to creative professionals because of that connection, but that connection does not make the creative professional the servant of the patron *or* of the state. The creative professional need not facilitate and celebrate the patron's message. These fashion

---

seems/?hpid=hp_local-news_givhan-945am%3Ahomepage%2Fstory&utm_term=.e4613ea57c41.

[5] Mehera Bonner, *Here's the Growing List of Designers Who Refuse to Dress Melania Trump*, Maria Claire (Mar. 11, 2017), http://www.marieclaire.com/fashion/news/g4254/designers-who-wont-dress-melania-trump/?slide=10.

designers rightly see their creative work as expressing support for political and moral beliefs. They also testify how dearly they hold the right to choose the patrons with whom they will enter into business relationships in accordance with the uncoerced dictates of their consciences. While any given American may find Theallet's protest overwrought, it is unthinkable that the state should have the power to override her declaration of conscience.

But acts of conscience aren't limited to fashion designers. Stories are legion of bakers refusing to design and bake custom cakes containing messages they find offensive. For example, a Louisiana Walmart made headlines for refusing to craft a Confederate battle flag cake featuring the words "heritage, not hate" – but then mistakenly designed an ISIS flag cake at the same customer's request. Walmart apologized, claiming that its bakers didn't know the requested design was an ISIS flag.[6]

Not all bakeries operate in ideological lockstep. In 2015, an ABC News affiliate reported on a bakery that asserted it would be happy to design Confederate Flag cakes, but it would not bake an ISIS cake. The Fredericksburg, Virginia, bakery posted a picture of a Confederate Flag cake and then wrote underneath the post, "We post many special orders, and will

---

[6] Susanna Kim, *Walmart apologizes for making ISIS cake for man denied Confederate Flag design*, ABC News (June 29, 2015), http://abcnews.go.com/Business/walmart-apologizes-making-isis-cake-man-denied-confederate/story?id=32103721.

continue to do so. No, we will not do ISIS or Nazi cookie cakes, so don't be ridiculous."[7]

Bakeries can get political as well. In September 2016, the *Washington Examiner* reported that an Albertson's grocery store refused to bake a Donald Trump-themed cake. After a public outcry (but not a lawsuit!), the chain apologized, claiming that the refusal was due to a misunderstanding of copyright law. Albertson's offered to create for the customer the cake she wanted, but by then she had done exactly what a free market allows – she'd found another baker.[8]

In fact, the court below also noted multiple incidents where other bakers made their own expressive statements. It distinguished Masterpiece Cakeshop from three incidents where bakeries refused to design cakes with religious messages denouncing same-sex marriage and same-sex relationships. In an oddly-argued attempt to distinguish the cases, the Court wrote, "The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message." *Craig v. Masterpiece Cakeshop, Inc.* 370 P.3d 272, 282 n.8 (Colo. App. 2015). The Court continued, "Importantly,

---

[7] *Va. Bakery creates stir online with Confederate flag cake*, ABC7 WJLA News (July 10, 2015), http://wjla.com/news/local/va-bakery-creates-stir-online-with-confederate-flag-cake-115430.

[8] Anna Giaritelli, *Grocery store refuses to bake Trump-themed cake*, Washington Examiner, Sept. 7, 2016, http://www.washingtonexaminer.com/grocery-store-refuses-to-bake-trump-themed-cake/article/2601212.

there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes." *Id.*

Follow the "logic." The refusal of a religious customer's request for a religious message is not discrimination on the basis of religion in part because the baker has helped convey other religious messages from other religious customers. Yet refusing a gay customer's request for a message celebrating gay marriage is sexual-orientation discrimination even though the baker has helped other gay customers convey other messages. That's not a legal principle. It's classic, results-oriented jurisprudence.

In fact, if one applied the same judicial reasoning to the cases mentioned above, it's easy to see how one could shoehorn virtually any refusal to express a message into an act of status-based discrimination prohibited by expansive public accommodation statutes. Women (a protected class) are disproportionately affected by a designer's refusal to design new dresses. White Americans (a protected class) are disproportionately affected by a refusal to bake Confederate Flag cakes. Christians (again, a protected class) are disproportionately affected by refusals to print "offensive" Bible verses.

The court below called Masterpiece Cakeshop's decision not to bake a cake for a same-sex wedding conduct "so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status." *Id.* at 281. Yet isn't

that true for each of the categories of refusal outlined above?

But each of these refusals – like the refusals of Masterpiece Cakeshop to bake the cake at issue in this case – is small-scale compared to the immensely consequential actions of large politically-active corporations. The politicization of corporate action is too common to list all of the consequential examples, but if one wants to focus on action implicating the rights of protected classes (people of faith) consider the overwhelmingly negative corporate response to state efforts to *expand* protection for religious liberty.

The National Football League's corporate threat to move the Super Bowl was instrumental in persuading then-Arizona governor Jan Brewer to veto a state Religious Freedom Restoration Act.[9] When Georgia considered its own Religious Freedom Restoration Act, Walt Disney placed immense pressure on the state, threatening to pull filming from its Pinewood Studios outside Atlanta.[10] And these examples pale in comparison to the multi-corporation offensive waged against the state of Indiana when it passed its own religious liberty bill.[11] A *Los Angeles*

---

[9] Tommy Tomlinson, *How the NFL Helped Kill Arizona's Anti-Gay Rights Bill*, Forbes, Feb. 27, 2014, https://www.forbes.com/sites/tommytomlinson/2014/02/27/arizona-gay-rights-and-the-super-bowl/#1dd14455214c.

[10] Ted Johnson, *Disney, Marvel to Boycott Georgia if Religious Liberty Bill is Passed*, Variety, Mar. 23, 2016, http://variety.com/2016/biz/news/disney-marvel-boycott-georgia-anti-gay-bill-1201737405/.

[11] Eric Bradner and Jeremy Diamond, *Mike Pence: 'Was I expecting this kind of backlash? Heavens no.,'* CNN (Mar. 31,

Times roundup of the state-by-state battles over religious liberty includes some of America's most well-known and powerful corporations. Each of these corporations used their corporate voice to advance their corporate values.[12]

It's important to note that in each of these examples, the corporate imposition was far less than the imposition on Masterpiece Cakeshop. Opening a facility or filming a movie in a state is not the same thing as creating a piece of art that actually expresses a point of view the artist abhors. In fact, the company could use the facility or the movie to express *opposition* to the state's policies. Here, Masterpiece Cakeshop would be part of the very expression it opposes.

A better analogy – though still not nearly as intrusive because it does not involve the actual creation of the art itself – is to the corporate effort in the aftermath of the Charleston, South Carolina, church massacre to ban the sale of objects featuring the Confederate Flag. Walmart, Sears, eBay and many other vendors removed not just flags from their shelves, but also products that featured flag designs.[13]

2015) http://edition.cnn.com/2015/03/31/politics/pence-will-fix-religious-freedom-legislation/index.html.

[12] Libby Hill, *Some call it religious freedom, others call it anti-gay. Here's a look at the battle in some states*, L.A. Times, Apr. 5, 2016, http://www.latimes.com/entertainment/la-et-states-antigay-battle-20160325-snap-htmlstory.html#.

[13] MJ Lee, *Walmart, Amazon, Sears, eBay to stop selling Confederate flag merchandise*, CNN (June 24, 2015) http://edition.cnn.com/2015/06/22/politics/confederate-flag-walmart-south-carolina/index.html.

A law requiring these entities to stock items that send a repugnant message would be blatantly unconstitutional. How much more unacceptable would be a law requiring these vendors to *create* the items they despise?

The creative professionals profiled above, including the creative professionals at Masterpiece Cakeshop, are engaged in conduct remarkably similar to the conduct of the stalwart Jehovah's Witnesses in *Barnette*. When asked by others if they would participate in an act of expression they abhor, these creative professionals say no. They understand reality. They understand that no one would think that Melania Trump designs her own dresses, that customers create their own custom cakes, or that married couples make the beautiful elaborate confections that stand as the centerpiece of a wedding reception. They understand that the expression involved is thus joint expression with their patrons. They are lending their unique talents to acts secular and sacred. Doing so must be their choice.

III. To Undermine *Barnette* Is To Cruelly Impoverish the Marketplace of Ideas.

For if these acts of creation are undertaken, not by choice, but by compulsion, do not imagine that the baker will be merely passively complying with the law. The patron-artist relationship is not like a gumball machine that mechanically dispenses a product when payment is inserted. Quite the contrary, artistic work done at the behest of others involves the investment of the artist's mind and imagination in the expression of ideas suggested by a

patron who has commissioned the artwork. This is, indeed, the major reason why artists are commissioned by patrons in the first place. We need not agree with those who say that all commercialized artwork is "prostitution" to understand why they speak that way. Artistic work involves the whole person – mind, body, and soul. The use of the artist's creative talents must be undertaken willingly, or it is a violation of his integrity.

For this reason, there is something particularly cruel about coerced artistic expression, which was recognized even in ancient times. Indeed, the Psalmist gives voice to the suffering of the artist under duress:

> By the rivers of Babylon, there we sat down, yea, we wept, when we remembered Zion. We hanged our harps upon the willows in the midst thereof. For there they that carried us away captive required of us a song; and they that wasted us required of us mirth, saying, Sing us one of the songs of Zion.

Psalm 137:1-3 (KJV).

The psalmist also viscerally describes the feeling of inner revulsion the artist feels at the idea of employing his artistic talents under coercion:

> If I forget thee, O Jerusalem, let my right hand forget her cunning. If I do not remember thee, let my tongue cleave to the roof of my mouth. . . .

Psalm 137:5-6 (KJV).

He would rather lose his ability to play the lyre, lose his ability to sing, than employ his skill for the schadenfreude of those who hate the city that he loves. A similar situation is at work in this case: The owner of Masterpiece Cakeshop would rather go out of business than be forced to use his skill to celebrate homosexual marriage. Shall the State of Colorado become the agent of this compulsion?

It might be objected that a cake-baker is not Michelangelo; a cake is not a painting; it is a pedestrian, edible, commercial product. Such an objection would be quite misguided. The request to design this cake was made in the context of a fiercely contested cultural struggle, in which everyday commercial merchandise has been turned into means of communicating support for one side or the other. For instance, Apple sells a rainbow watch band for its Apple Watch. Is this product only expressive of the wearer's views? Apple does not think so. It advertises the product with these words:

> Apple is proud to support LGBTQ advocacy organizations working to bring about positive change, including GLSEN, PFLAG and The Trevor Project in the U.S. and ILGA internationally.[14]

If a rainbow watch band is an expression of advocacy for political and moral "change," then so is a

---

[14] *Accessories: 42mm Pride Edition Woven Nylon*, Apple, https://www.apple.com/ca/shop/product/MQ4G2AM/A/42mm-pride-edition-woven-nylon (last visited Sept. 5, 2017).

cake decorated with a similar motif. The only difference is that Apple's expression of support for LGBTQ advocacy is freely created and freely offered, while Masterpiece Cakeshop's would be under duress and legal coercion. Apple rightly understands that corporations have First Amendment rights, and that they should be free to use them to advocate positions in accordance with the dictates of their corporate consciences. Apple's CEO Tim Cook explains:

> It's no accident that these freedoms are enshrined and protected in the *First* Amendment. They're the foundation of so many of our rights, which means we all have a stake and a role in defending them. This is a responsibility that Apple takes very seriously. I see our work to fulfill this responsibility as twofold. First, we work to defend these freedoms by enabling people around the world to speak up. And second, we do it by speaking up ourselves, because companies can and should have values. We have a perspective on major public issues, and we are prepared to take a stand for things that we deeply believe in... a company is not some faceless, shapeless thing that exists apart from society. A company is a collection of human beings, and part of the fabric of our society. A company like ours has a culture, it has values, and it has a voice. Apple has spoken out, and will continue to speak out, for what we believe as a company. And the positions we take will continue to guide our actions. So we will continue to speak up for environmental protection. We will continue to

> stand up for inclusion and diversity in all facets of life. And we will continue to stand up for human rights, including the right to privacy.[15]

Apple understands it has a First Amendment right as a corporation to participate freely in the shaping of public opinion, and it does this by choosing which opinions it will express via the designs of its products and its publicly announced partnerships.

The large corporations go even farther. Not only will they not create products that send unacceptable messages, they won't do business in places that promulgate (to them) unacceptable laws. There is no serious effort to call into legal question their ability to do business where they choose to do business (nor should there be), yet the constitutional imposition of such a law would be far smaller than the constitutional imposition on Masterpiece Cakeshop. In this case, the state is demanding that a baker not only do business with a certain patron, it's demanding that he create and speak the patron's message. How could Colorado prevail and *Barnette* – and indeed, expressive freedom itself – survive?

CONCLUSION

If the state of Colorado prevails in this case, fundamental First Amendment rights have become

---

[15] Timothy Cook, CEO, Apple, Address at the Newseum's 2017 Free Expression Awards Ceremony (April 18, 2017) (transcript and video available at https://www.c-span.org/video/?427127-1/newseum-presents-2017-free-expression-awards).

fragile indeed. They survived world war and the pressure for national unification in the face of an existential threat. Can they survive the sexual revolution and the modern pressure for ideological uniformity? That is what this Court will decide.

It is important to remember that this Court has clearly distinguished the constitutional right to marry from any legal obligation to adopt the state's view about the nature of marriage. Writing for the majority in *Obergefell*, Justice Kennedy was clear:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

135 S. Ct. at 2607.

This is the language that preserves the First Amendment. This is the language that preserves *Barnette*. The owners of Masterpiece Cakeshop are religious persons who are not willing to violate "the principles that are so fulfilling and so central to their lives and faiths." Or, to put it another way, they are not willing to let any Colorado official, high or petty, "prescribe what shall be orthodox" regarding the

institution of marriage "or force citizens to confess by word or act their faith therein."

May that star remain fixed in our constitutional constellation. The judgment of the court below must be reversed.

Respectfully submitted,

DAVID FRENCH
Counsel of record
Senior Fellow
NATIONAL REVIEW INSTITUTE
215 Lexington Avenue
11th Floor
New York, New York 10016
(931) 446-7572
dfrench@nationalreview.com

Counsel for *Amici Curiae*

September 7, 2017